ORIENTAL FINANCE BHD

v.

EMAS KEJURUTERAAN SDN BHD & ORS

HIGH COURT MALAYA, KUALA TERENGGANU
NIK HASHIM J
[CIVIL SUIT NO: 22-11-99]
3 SEPTEMBER 2002

LIMITATION: *Accrual of cause of action - Failure to repay loan - When cause of action accrued - Whether cause of action time-barred - Limitation Act 1953, s. 6*

CIVIL PROCEDURE: *Summary judgment - Appeal - Loan agreement - Whether triable issues existed - Whether cause of action time-barred - Limitation Act 1953, s. 6*

This was an appeal by the plaintiff against part of the decision of the learned senior assistant registrar dismissing the plaintiff's application for summary judgment pursuant to O. 14 of the Rules of the High Court 1980 against the defendants for accrued interests amounting to RM819,389.86 as at 20 October 1998. The defendants contended that there were triable issues in that: (1) the plaintiff's cause of action was time-barred under s. 6 of the Limitation Act 1953 ('the Act'); (2) the first defendant's letter was not an admission of the loan and interest that it owed the plaintiff; and (3) the said letter, even if applicable, was not binding on the second and third defendants, who were the guarantors of the loan.

Held:

[1] The first defendant's liability to pay the amount owing only arose after the plaintiff's letter of demand dated 17 November 1998 was issued. Since the first defendant had failed to pay the outstanding sum, the plaintiff's cause of action therefore accrued on or about 17 November 1998 when the demand was made and not on 16 June 1986 when the loan was disbursed. Hence, the institution of the plaintiff's action on 21 March 1999 was obviously within the six-year limitation period as prescribed under s. 6 of the Act. (pp 452 h-i & 453 a-b)

[2] The said letter was a clear admission by the first defendant that it took a loan of RM410,000 from the plaintiff. Given that the first defendant also acknowledged the interest accruing thereon and did not dispute the

existence and/or the calculation of the interest chargeable, it was therefore an implied admission by the first defendant that it owed the plaintiff the total outstanding loan sum together with the continuing interest thereon which amounted to RM1,229,389.86. (pp 453 h & 454 a)

[3] The first defendant's admission of its debt was binding on the second and third defendants as guarantors based on their liability as principal debtors under the guarantee. Therefore, they were jointly and severally liable to the plaintiff for the first defendant's debt. (p 454 c & f)

[4] Contrary to the intentions of the defendants, there were clearly no triable issues in this case. (p 454 f)

[Appeal allowed.]

Case(s) referred to:
Bangkok Bank Ltd v. Cheng Lip Kwong [1990] 1 CLJ 1017; [1990] 3 CLJ (Rep) 523 ***(refd)***
Bank Pertanian Malaysia v. Mohd Gazzali Mohd Ismail [1996] 5 MLJ 692 ***(refd)***
Southern Bank Bhd v. Shin Huat Joo Enterprise [1998] 3 CLJ 941 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6
Rules of the High Court 1980, O. 14

For the plaintif - Parimalar Selvarajah; M/s AI Nathan Assocs
For the defendants - Azrulrizal Ibrahim; Abdullah Abd Rahman & Co

Reported by Suresh Nathan

JUDGMENT

Nik Hashim J:
This, is an appeal by the plaintiff by way of encl. 22 against a part of the decision of the learned Senior Assistant Registrar ('the SAR') given on 31 January 2001 whereby the plaintiff's application for summary judgment pursuant to O. 14 of the Rules of the High Court 1980 ('the RHC') against the defendants for accrued interest (inclusive of default interest and incidental costs) amounting to RM819,389.86 as at 20 October 1998 was dismissed.

The SAR's decision on 31 January 2001 is as follows:

> That the plaintiff be allowed to enter final judgment pursuant to O. 14 of the RHC against the defendants for:
>
> (a) RM410,000 (being principal sum only).

(b) Interest on RM410,000 at the rate of 14.05% per annum from 21 October 1998 until full realisation, and

(c) Costs of this application.

Whereas the plaintiff's original claim by summons in chamber dated 8 June 1999 at encl. 6 is for leave to enter judgment against the defendants pursuant to O. 14 of the RHC for:

(a) RM1,229,389.86 as at 20 October 1998.

(b) Interest on RM1,229,389.86 at the rate of 14.05% per annum from 21 October 1998 until full realisation; and

(c) Costs of this application.

By a loan agreement dated 16 June 1986 (the agreement), *vide* exh. MSOI in encl. 6A, the plaintiff granted the 1st defendant a term loan for the sum of RM410,000 on terms and conditions contained therein. Section 3.04(a) of the agreement provides for the interest on the said loan at the rate of 15.75% ie., 4% per annum + BLR, which at that material time was at 11.75% per annum calculated on monthly rest from the date of draw down until full settlement. The 1st defendant *vide* its letter exh. AH3 to the plaintiff dated 9 May 1996 in encl. 21 has admitted having received the loan sum of RM410,000 and made a proposal for settlement. In consideration for granting of the said loan by the plaintiff to the 1st defendant, the 2nd and 3rd defendants executed a guarantee dated 16 June 1986 *vide* exh. MSO2 in encl. 6A. The terms of the guarantee *inter alia* are that the 2nd and 3rd defendants have guaranteed the due payment of the said loan, interest thereon and all other moneys owing and payable by the 1st defendant to the plaintiff *vide* s. 1.02 of the guarantee. By s. 2.01 of the guarantee, the 2nd and 3rd defendants have guaranteed to the plaintiff not merely as sureties but as principal debtors. The 1st, 2nd and 3rd defendants have admitted to executing the agreement and guarantee respectively *vide* para. 4 of affidavit in encl. 8.

The 1st defendant breached the terms of the agreement by failing to repay the said loan in accordance to the terms of repayment contained therein and the plaintiff is therefore entitled to recover the principal sum of RM410,000 plus interest on the said sum from the date of draw down until 20 October 1998. By the statement of account as at 20 October 1998 *vide* MSO4 in encl. 6A, the accrued interest was RM819,389.86. Therefore, the plaintiff submitted that its claim amounting to RM1,229,389.86 (RM410,000 + RM819,389.86) ought to be granted in full by the court.

Learned counsel for the defendants submitted that there are triable issues in this case in that:

(i) the plaintiff's cause of action is time-barred under s. 6 of the Limitation Act 1953 (the Act).

(ii) The 1st defendant's letter *vide* exh. AH3 in encl. 21 is not an admission to the plaintiff's claim.

(iii) The said letter even if applicable, is not binding on the 2nd and 3rd defendants,

and asked for the appeal to be dismissed with costs.

After perusing the record and considering the submissions of both parties, I, on 1 July 2002 allowed the appeal with costs and final judgment in respect of the amount RM819,389.86 as at 20 October 1998 be entered against the defendants as prayed.

I now give my reasons.

Section 6 of the Act provides that the six years limitation period for causes of action founded on contract begins from the date the cause of action accrued. Therefore, in order to determine whether the plaintiff's cause of action is time-barred or not, it is necessary to ascertain when the plaintiff's cause of action against the defendants arose.

Section 7.01 of the agreement between the plaintiff and the 1st defendant states:

> The whole of the principal amount of the loan and interest thereon and any other moneys covenanted to be paid by the Borrower under this Agreement shall **become due and immediately repayable on demand**. (Emphasis added)

Further to the 1st defendant's breach of the agreement and pursuant to s. 7.01 above, the plaintiff made a demand against the 1st defendant through the plaintiff's solicitor's letter dated 17 November 1998 *vide* exh. MSO3 in encl. 6A wherein the 1st defendant was given a time period of seven days to pay the outstanding sum of RM1,229,389.86 as at 20 October 1998.

It was an express term of the agreement that a demand be issued. Such an 'on demand' provision of the agreement made a demand an absolute necessity and time therefore did not run against the plaintiff until a demand was made and repayment had been refused. Thus, by the clear provisions of s. 7.01 of the agreement, the 1st defendant's liability to pay the amount owing only arises after the said letter of demand dated 17 November 1998 was issued. Since the 1st defendant had failed to pay the sum outstanding, the plaintiff's cause of action therefore accrued on or about 17 November 1998 when the demand

was made and not on 16 June 1986 when the loan was disbursed (see *Bank Pertanian Malaysia v. Mohd Gazzali Mohd Ismail* [1996] 5 MLJ 692). Hence the institution of the plaintiff's action on 21 March 1999 is obviously within the six years limitation period as prescribed under s. 6 of the Act.

With regards to the 2nd and 3rd defendants' liability, it was also an agreed term that their liability to pay accrues also on demand. Section 2.02 of the guarantee *vide* exh. MSO2 in encl. 6A provides:

> In the event of the Borrower failing to observe and perform any of the covenants ... contained in the Loan Agreement ... MIFB shall ... be **entitled to demand repayments in full from the Guarantors** of the whole of the Loan or such amount as may be then outstanding ... . (Emphasis added)

Whereas s. 6.01 states:

> If the Borrower shall ... fail to perform any of its obligations under the Loan Agreement ... then the **Guarantors shall indemnify MIFB** against all losses damages costs expenses ... and shall make payment of all sums due to MIFB **immediately upon demand being made**. (Emphasis added)

Pursuant to ss. 2.02 and 6.01 of the guarantee, the plaintiff made a demand to the 2nd and 3rd defendants through the plaintiff's solicitor's letter dated 17 November 1998 *vide* exh. MSO3 in encl. 6A. As a result of the 1st defendant's failure to pay the sum demanded by letter dated 17 November 1998, the plaintiff filed this action on 21 March 1999. Therefore, given that the cause of action accrued on or about 17 November 1998 and that this action was filed on 21 March 1999, the plaintiff's claim against the 2nd and 3rd defendants too is not time-barred under s. 6 of the Act.

Respecting the second contention of the defendants that the 1st defendant's letter AH3 in encl. 21 is not an admission to the plaintiff's claim, I find there is no merit at all in the contention. In the letter, the 1st defendant stated:

> Pinjaman asal kami sebanyak RM410,000 gagal kami bayar balik kerana keadaan ekonomi yang merosot ketika itu. ... Oleh itu, kami ingin memohon jasa baik tuan agar dapat menghapus kira kesemua faedah-faedah yang dikenakan keatas kami.

Clearly, the letter is an admission by the 1st defendant that it took a loan of RM410,000 from the plaintiff. Given that the 1st defendant also acknowledged interest accruing thereon and did not dispute the existence and/or the calculation of the interest chargeable, therefore it is an implied admission by the 1st defendant that it owed the plaintiff RM410,000 together with continuing interest thereon at the rate and based on the agreed terms of the agreement.

As at 20 October 1998 the total outstanding loan amount together with interest thereon was RM1,229,389.86, and it was correct.

On the defendants' contention that the letter AH3 is not binding on the 2nd and 3rd defendants, s. 1.03 of the guarantee exh. MSO2 in encl. 6A clearly states:

> The Guarantors are executing this Guarantee in favour of MIFB as security for the loan, interest thereon and all other moneys owing and payable by the Borrower to MIFB under the terms of the Loan Agreement.

Thus, the 1st defendant's admission of his indebtedness under the agreement is binding on the 2nd and 3rd defendants as guarantors based on the liability under the guarantee.

Further, it is also a term under s. 6.03 of the guarantee *vide* exh. MSO2 in encl. 6A that was agreed by the 2nd and 3rd defendants that any statement of account showing the indebtedness of the 1st defendant to the plaintiff duly certified by the officer of the plaintiff shall be binding and conclusive against the 2nd and 3rd defendants. Since the 2nd and 3rd defendants have failed to dispute the accuracy of the debt and or interest in the plaintiff's certified statement of account in exh. MSO4 in encl. 6A, the statement of account is therefore conclusive and binding evidence of the indebtedness of the 2nd and 3rd defendants to the plaintiff (see *Bangkok Bank Ltd v. Cheng Lip Kwong* [1990] 1 CLJ 1017; [1990] 3 CLJ (Rep) 523; *Southern Bank Bhd v. Shin Huat Joo Enterprise* [1998] 3 CLJ 941).

Based on the liability of the 2nd and 3rd defendants as principal debtors under the guarantee, the 2nd and 3rd defendants are therefore jointly and severally liable to the plaintiff for the 1st defendant's debt.

Contrary to the contentions of the defendants, there are clearly no triable issues in this case.

In the circumstances, I allowed the appeal accordingly.